(28,985)

CERTIFICATE.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1922.

No. 435.

JOHN BROSNAN, JR., MARY BRAMHALL, IRENE McCARTHY, ET AL.

vs.

MARGARET E. BROSNAN.

ON CERTIFICATE FROM THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., AUGUST 5, 1922.

1 In the Court of Appeals of the District of Columbia.

No. 3755.

JOHN BROSNAN, JR., MARY BRAMHALL, IRENE MCCARTHY, NELLIE Brosnan, Julia Meinberg, and Catherine Vernon, Appellants,

vs.

MARGARET E. BROSNAN, Appellee.

The Court of Appeals of the District of Columbia certifies that the record in this case discloses the following:

Timothy Brosnan died in the District of Columbia, wherein he resided and was domiciled, on May 2, 1919, leaving a last Will and Testament dated July 29, 1918, which was duly filed for probate, whereupon his widow Margaret Brosnan, the appellee here, filed a caveat challenging the mental capacity of the decedent. At the close of the evidence, which was conflicting upon this point, the proponents of the Will, appellants here, prayed the court to instruct the jury that on this issue the burden of proof was upon the caveator. The court declined to so rule but instructed the jury, as requested by the caveator, that the burden of proof was upon the caveatees and that, if the jury should find "that the evidence is evenly balanced or that the weight of the evidence is in favor of finding that the testator was of unsound mind," the verdict should be against testamentary capacity.

The Court of Appeals certifies that the following question of law arises upon the record, the decision of which is necessary for the proper disposition of the case, and, to the end that a correct result may be reached, desires the instruction of the Supreme Court
2 of the United States upon that question, to wit: upon the issue whether the testator, at the time of the execution of the Will, was "of sound and disposing mind and capable of executing a valid deed or contract," is the burden of proof in the District of Columbia upon the caveator or caveatee?

CONSTANTINE J. SMYTH,
Chief Justice.

CHAS. H. ROBB,
JOSIAH A. VAN ORSDEL,
Associate Justices.

Endorsed: No. 3755. John Brosnan, Jr., et al., Appellants, vs. Margaret E. Brosnan. Certification to the Supreme Court of the United States. Court of Appeals, District of Columbia. Filed June 5, 1922. Henry W. Hodges, Clerk.

3 Court of Appeals of the District of Columbia.

I, Henry W. Hodges, Clerk of the Court of Appeals of the District of Columbia, do hereby certify that the foregoing typewritten pages numbered from 1 to 2, inclusive, contain a true copy of the certification from this Court to the Supreme Court of the United States of the question stated therein in the case of John Brosnan, Jr., Mary Bramhall, Irene McCarthy, Nellie Brosnan, Julia Meinberg and Catherine Vernon, Appellants, vs. Margaret E. Brosnan, No. 3755, as the same remains upon the files and records of said Court of Appeals.

In testimony whereof I hereunto subscribe my name and affix the seal of said Court of Appeals, at the City of Washington, this 5th day of June, A. D. 1922.

[Seal of the Court of Appeals, District of Columbia.]

HENRY W. HODGES,
Clerk of the Court of Appeals of the District of Columbia.

Endorsed on cover: File No. 28,985. District of Columbia Court of Appeals. Term No. 485. John Brosnan, Jr., Mary Bramhall, Irene McCarthy, et al. vs. Margaret E. Brosnan. (Certificate.) Filed June 15th, 1922. File No. 28,985.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1923.

No. 56.

JOHN BROSNAN, JR.,

vs.

MARGARET E. BROSNAN.

BRIEF FOR MARGARET E. BROSNAN.

STATEMENT OF CASE.

This matter is before this Court on the certificate of the Court of Appeals of the District of Columbia in which this Court is asked to answer the following question upon the issue:

> "WHETHER THE TESTATOR, AT THE TIME OF THE EXECUTION OF THE WILL WAS 'OF SOUND AND DISPOSING MIND AND CAPABLE OF EXECUTING A VALID DEED OR CONTRACT,' IS THE BURDEN OF PROOF IN THE DISTRICT OF COLUMBIA UPON THE CAVEATOR OR CAVEATEE?"

The Court of Appeals of the District of Columbia states the facts to be thus:

> "Timothy Brosnan died in the District of Columbia, wherein he resided and was domiciled, on May 2, 1919, leaving a last will and testament, dated

July 29, 1918, which was duly filed for probate, whereupon his widow, Margaret Brosnan, the appellee herein, filed a caveat challenging the mental capacity of the decedent. At the close of the evidence, which was conflicting upon these points, the proponents of the will, appellants herein, prayed the court to instruct the jury that on these points, the burden of proof was upon the caveator. The court declined to so rule, but instructed the jury, as requested by the caveator, that the burden of proof was upon the caveatees, and that, if the jury should find 'that the burden is evenly balanced, or that the weight of the evidence is in favor of finding that the testator was of unsound mind,' the verdict should be against the capacity of the testator."

In giving this instruction to the jury the trial justice followed the language of the Court of Appeals of the District of Columbia, which decided this question of law, on the 8th of December, 1899, as reported in

RICH vs. LEMMON,
15 App. D. C. 507-510.

The opinion of the Court of Appeals of the District of Columbia was delivered by the late Chief Justice Alvey of that Court, and concurred in by his then associates, Mr. Justice Morris and Mr. Justice Shepard.

There were three issues before the Court in that case:

(1) Whether the paper writing was duly executed.
(2) Whether the testator was of sound and disposing mind.
(3) Whether the paper writing was procured by fraud or undue influence.

The issues were tried by a jury and the findings on the first two issues were in the affirmative and on the third in the negative. The case was before the Court of Appeals on the question of the position of the parties upon the record—that is, who should occupy the position of plaintiff with the right to open and conclude, and who that of the defendant. The court ruled and ordered that the caveatee should be the plaintiff and the caveator the defendant, and this question was before the court for its decision.

In deciding this question in this case, as found on page 509 of the court's opinion, the court said:

> "It is very clear, we think, that this appeal can not be maintained. The onus of proof, as to the first two issues, was by the nature and form of such issues, upon the caveatee or proponent of the paper as the will of the deceased, but the onus of proof as to the third issue was upon the caveator. In such case as the present, therefore, it would seem to be altogether proper that the caveatee should have the opening and conclusion of the evidence, and of the argument before the jury as until the due execution and attestation of the paper were proved by the proponent of the paper as the last will and testament of the deceased, the caveator would not be called upon for evidence, and there would be nothing to be assailed by proof. In other words, until the factum of the will is either admitted expressly or by the form and nature of the issues to be tried there is no substantive matter presented to which the proof of the caveator could formally and orderly be addressed. The question, however, of the position of the parties in the trial of such issues would seem to be largely a matter of discretion of the trial court, and from the determination of such question no appeal will lie to an appellate court. It is true,

> in some jurisdictions, as in the courts of Maryland, it would seem to be settled as matter of practice that the caveator, being the assailant of the alleged will, is generally assigned the position of plaintiff upon the record, with right to open and close, and that the determination of the question is a subject-matter of review by the appellate court of the State."

We respectfully submit that this decision settles the law for the District of Columbia that under the issue of *mental capacity* the burden is upon the caveatee, the proponent of the will.

It is likewise true that this decision settles the law for the District of Columbia that under the issue of *undue influence* the burden is upon the caveator.

THIS COURT WILL FOLLOW THE DECISION OF THE APPELLATE COURT OF A STATE OR TERRITORY IN MATTERS OF PROCEDURE OR CONSTRUCTION OF LOCAL STATUTES.

We cite the decisions of this Court supporting this position as follows:

In

ARMIJO vs. ARMIJO,
181 U. S. 558-561.

the Court in its opinion in deciding this question, as found on page 561, said:

> "This matter of practice in the courts of the territory is based upon legal statutes and procedure, and we are not disposed to review the decision of the Supreme Court in such case."

In

WILLIAMS vs. EGGLESTON,
170 U. S. 304-312.

the Court in its opinion in deciding this question, as found on page 311, said:

> "It is true there was a division of opinion between the members of the State Supreme Court, but such division although a close one, does not prevent the opinion of the majority from becoming the decision of the court, and as such conclusive upon us. When the State Court decides that municipal corporations within the territorial limits of the State are subject to the control of the State Legislature, and that its act in creating for certain purposes a new corporation, and merging therein five separate towns, was valid, this court cannot hold that the State Court was mistaken in its construction of the State Constitution or in its declaration as to the extent of the power of the legislature over municipal corporations."

We likewise find an opinion of this Court delivered by Mr. Justice Miller in the case of

SWEENEY vs. LOMME,
89 U. S. 208-215.

deciding this question thus:

> "Without expressing any opinion of our own on the question we hold that as it is one which arises under their own Code of practice, we should, in this conflict of authority, adopt the ruling of the Supreme Court of Montana in the consideration of it. This assignment of error is, therefore, not well taken."

We likewise find an opinion of this Court delivered by Mr. Justice Field in

GALPIN vs. PAGE,
85 U. S. 350-375.
(18th Wall.)

deciding this question thus:

> "The adjudication of the appellate court constitutes the law of that case upon the points adjudged and is binding upon the Circuit Court and every other court when brought before it for consideration."

We likewise find an opinion of this Court delivered by Mr. Justice Johnson in the case of

LIVINGSTON vs. MORE,
7 Peters 469-553.

in which he states, in deciding this question, as found on page 542 thus:

> "Now, the relation in which our circuit courts stand to the states in which they respectively sit and act is precisely that of their own courts, especially when adjudicating on cases where State lands or State statutes come under adjudication. When we find principles distinctly settled by adjudications, and known and acted upon as the law of the land, we have no more right to question them or deviate from them than could be correctly exercised by their own tribunals."

The trial courts have followed the decision of the Court of Appeals of the District of Columbia in Rich vs. Lemmon, *supra.*

We have the latest decision of the trial courts of the District of Columbia on the question of the burden of proof under the issue of mental capacity, decided on November 24, 1923, reported as

In re Estate of MARION ROBINSON,
45 Wash. Law Rep. (1917), 760.

This decision was rendered by the Present Chief Justice of the Supreme Court of the District of Columbia.

It appears from this decision that counsel, who are now here contending that the burden of proof on the issue of *mental capacity* is on the caveator, were successful in maintaining the position in that case that the burden was upon the caveatee.

I have cited this case because by an examination of this case, it will be found that the trial justice in his opinion has considered practically all of the cases now relied upon by counsel for the appellant in this case.

It will be noted that the Court also took up and considered this court's language in

LEACH vs. BURR,
188 U. S. 510-516.

It is respectfully submitted, however, that but for the language of this court in its opinion in the above cited case, as found reported in the last paragraph thereof, this question would never have been before this court, as the Court of Appeals of the District of Columbia would have followed its former decision.

Looking first to the decision of the Court of Appeals in this case, which we find reported as

LEACH vs. BURR,
17th App. D. C. 128-144.

Mr. Justice Morris of the Court of Appeals of the District of Columbia, in his opinion, as found on page 140, states the question before the Court thus:

> "We have sought in vain through the testimony embodied in the bill of exceptions for even a scintilla of evidence proper to go to a jury. The only portion of the testimony seriously insisted on by the appellants in this connection is a part of the deposition of Rev. Hugh T. Stevenson, the pastor of the church of which the deceased testator was a member. * * *
>
> "Upon this testimony it was argued that a jury might fairly have inferred the exercise of undue influence by Stevenson on the testator. But we fail to find any justification for such an inference. Even assuming that the opportunity for such influence was present, and that the relations between the testator and Stevenson were such as to throw upon the caveatees the burden of proving that no such undue influence was exercised, as to which under the circumstances there is reason to doubt, yet the fact is that the testimony of Stevenson fully and fairly sustains that burden."

It is respectfully submitted that when the Court examines this case and reads this language, it will see that there was no question of mental capacity before the Court, but that the question of undue influence was argued before the Court and the testimony of one witness relied upon in support of the argument.

This Court will not find a single suggestion in the whole opinion of the Court of Appeals relating in any wise to mental capacity, because that question was not argued. In fact the question of the mental capacity of the testator was not urged upon the Court. The whole question was presented to the Court on exceptions

founded upon the ruling of the trial justice in directing a verdict sustaining the will.

When this question was decided by this Court and reported as

LEACH vs. BURR, *supra.*

Judge Brewer, who delivered the opinion of the Court, on page 513, said:

> "But the substantial question is whether the Court erred in taking the case from the jury and directing a verdict sustaining the will. * * *
>
> "Although jurors are the recognized triers of questions of fact, the power of a Court to direct a verdict for one party or the other is undoubted, and when a Court has done so and its action has been approved by the unanimous judgment of the direct appellate court, we rightfully pay deference to their concurring opinions."

The Court, thereafter, in considering the testimony, stated thus:

> "There was not a syllable of testimony, not a hint, that Lucas, or any other person, requested or suggested any disposition of the property. All that was done was done at the instance and upon the request of the testator. The caveators called four witnesses as to his mental condition only one of whom was present at any time during his sickness, and that the pastor above referred to. So far from their testimony tending to show mental weakness, it was abundant and emphatic that he was a man of positive convictions, clear-headed, though perhaps eccentric in some views, but at all times capable of making his own contracts and attending to his own affairs."

Analyzing this case as we find it, we have a case where in the lower court a proper argument was based upon the error of the Court in directing a verdict because there was one witness at least who gave testimony sufficient to establish an issue of fact on undue influence, and in this Court, we have the contention made that the trial court committed error in directing a verdict sustaining the will on the evidence offered by the caveator.

We respectfully submit, therefore, that there was no conflict of testimony in that case, and the Court was not called upon to pass upon the burden of proof.

We find no reference to the burden of proof in the decision of the Court of Appeals of the District of Columbia, and we find no reference to the burden of proof in the decision of this Court, except and until we reach the last paragraph of the opinion of this Court, where we find this language:

> "Upon questions of this kind, submitted to a jury, the burden of proof, in this District at least, is on the caveators. Dunlop v. Peter, 1 Cranch, C. C. 403, Fed. Cas. No. 4,—168. See also Higgins v. Carlton, 28 Md. 115, 143, 92 Am. Dec. 666; Tyson v. Tyson, 37 Md. 567. The caveators in the present case failed to sustain this burden, and we are of the opinion that the trial court did not err in directing a verdict against them."

The Court of Appeals of the District of Columbia was in doubt as to the meaning, purpose, and intent of this language of this Court, as contained in the last paragraph of its opinion in Leach vs. Burr, *supra*, and thus this question is certified to this Court, so that in the future the Court of Appeals of the District of Columbia will be advised on that legal question.

STATUTES OF THE DISTRICT OF COLUMBIA RELATING TO THE ADMISSION OF WILLS TO PROBATE.

It will perhaps be helpful to the Court in considering this question to consider the statute in this District with reference to what is necessary to admit a will to probate.

With reference to the qualification made necessary by the statute to constitute a valid will, Section 1625 of the District Code of Laws states:

> "No will, testament or codicil shall be good and effectual for any purpose whatever unless the person making the same be, if a male, of the full age of 21 years, and if a female, of the full age of 18 years, and be at the time of executing and acknowledging it, as hereinafter directed, of sound and disposing mind and capable of executing a valid deed or contract."

From the reading of this statute it will readily be seen that before a will can be admitted to probate, in the District of Columbia, as a will it is necessary for the person who is alleged to have executed it to be of the required age and to have had full mental capacity so to do, and, therefore, the caveatee—the party who offers the will for probate—must prove due execution of the will, and must likewise maintain the burden imposed upon him by the statute to prove that the testatrix was of "*sound and disposing mind and capable of executing a valid deed or contract.*"

Thus, it will be seen that the Court in aligning the parties in all cases, where the issue is mental capacity and not undue influence, as in this case, entered its order making the caveatees—the proponents of the

will—parties plaintiff, and thereby giving them the right to open and close before the jury, likewise making the caveator the party defendant.

The parties being aligned in this manner, the proponents of the will must first prove due execution and mental capacity, and, therefore, the burden of proof is upon the caveatee to prove due execution and mental capacity.

Should they fail to maintain this burden and to establish these two necessary facts, the Court will declare the paper writing to be no will, and the caveatees would not be called upon to offer any evidence.

Should the caveatee, however, make out a *prima facie* case upon these two grounds, then the caveator is called upon to offer evidence in support of his claim of mental incapacity and lack of due execution.

The burden of proof on the question of mental capacity, and due execution being upon the caveatee (the proponent of the will), to satisfy the statute in this regard, continues through the trial with the caveatee, while the weight of the evidence shifts.

BURDEN OF PROOF.

In discussing the question of "burden of proof," as distinguished from "weight of evidence," the Supreme Judicial Court of Massachusetts in a very early decision, and reported as

POWERS vs. RUSSELL,
13 Pick. 69,

in an opinion of that court delivered by Mr. Chief Justice Shaw, said:

> "It may be useful to say a word upon the subject of the burden of proof. It was stated here that

the plaintiff had made out a *prima facie* case, and, therefore, the burden of proof was shifted and placed upon the defendant. In a certain sense this is true. Where the party having the burden of proof establishes a *prima facie* case, and no proof to the contrary is offered, he will prevail. Therefore the other party if he would avoid the effect of such *prima facie* case, must produce evidence, of equal or greater weight, to balance and control it, or he will fail. Still the proof upon both sides applies to the affirmative or negative of one and the same issue, or proposition of fact; and the party whose case requires the proof of that fact has all along the burden of proof. It does not shift, though the weight in either scale may at times preponderate. * * *

"To illustrate this: *prima facie* evidence is given of the execution and delivery of a deed; contrary evidence is given on the other side, tending to negative such fact of delivery; this latter is met by other evidence, and so on through a long inquiry. The burden of proof has not shifted, though the weight of evidence may have shifted frequently; but it rests on the party who originally took it."

The Court of Appeals of the District of Columbia has always held to this view of the weight of evidence, the principle being well stated in a very recent decision of the Court of Appeals of the District of Columbia, reported as

SULLIVAN vs. CAPITAL TRACTION COMPANY, 34 App. D. C. 358-376.

Quoting from page 367, the Court said:

"We think the difficulty arises from treating the terms 'burden of proof' and 'weight of evidence' as synonymous. The burden of proof always

remains with the party alleging the fact or state of facts in support of his case. The weight of evidence shifts from side to side during the trial accordingly as the proofs are in support or denial of the main fact or facts sought to be established."

This Court in

DAVIS vs. UNITED STATES,
160 U. S. 469-493

in an opinion of this Court delivered by Mr. Justice Harlan, as found on page 491 of that report, in considering the question of burden of proof, said:

"The criminal intent must be proved as much as the overt act, and without a sound mind such intent could not exist; and the burden of proof must always remain with the prosecutor to prove both the act and criminal intent."

FEDERAL COURT DECISIONS.

The United States Circuit Court of Appeals, eighth district, on November 18, 1918, in the case of

WELCH vs. KIRBY,
255 Fed. Rep. 451,

had before it the question of the burden of proof in will contests under a statute of Missouri (Rev. St. Mo. 1909, par. 537), which reads thus:

"Every will shall be in writing, signed by the testator or by some person in his direction in his presence, and shall be attested by two or more competent witnesses, subscribing their names to the will in the presence of the testator."

It will be seen that this statute is similar to the statute in the Supreme Court of the District of Columbia,

except that the statute in the Supreme Court of the District of Columbia goes further and requires that the testator must be "of sound and disposing mind and capable of executing a valid deed or contract."

In considering this statute in connection with the question of upon whom rests the burden of proof in a will contest, the Missouri court said:

> "Under the Missouri practice, in a cause of this character the proponents of the will (defendants) assume the burden of proving the proper execution of the will. * * *
>
> "A distinction is to be observed between a challenge of the paper presented as the will on the ground of fraud, because it was not the paper intended to be executed, on account of substitution, alteration, or deception, and between a challenge of it because not executed in the manner required by the statute."

The above case was before this Court on application for a Writ of Certiorari, which was denied, as found in

249 U. S. 612.

The Court of Appeals of the State of Connecticut had before it and decided this question as found in

WHEELER vs. ROCKETT,
91 Conn. 388.

The court in deciding this question—the burden of proof—on page 392 of this volume said:

> "The tenth assignment assigns error in the court's failure to charge, as requested by the defendant, that the law presumes every person sane and capable of making a will until the contrary is shown. The request was not adopted to the circumstances of the case before the jury, and if

given, would have tended to mislead them as to the party upon whom the burden of proof lay upon the question of the administrator's soundness of mind.

The burden of proof that the administratrix was of sound mind, was upon the proponents of the will. They might in the first instance prove the execution of it in due form, and if nothing in the circumstances at the time of its execution tended to show the contrary, the proponent's mind relied upon the prima facia presumption that the administratrix was of sound mind. The presumption of sanity would be sufficient until evidence tending to show the contrary was introduced by the contestants. The proponents would, after the introduction of such evidence, be required to rebut this by preponderating evidence, and the presumption of sanity would be no preponderative force."

This same question was before the court of Massachusetts, and is reported as

CLIFFORD vs. TAYLOR,
204 Mass. Rep. 358.

In discussing this question Chief Justice Knowlton, in rendering the opinion of the court, found on page 361, said:

"If upon the whole evidence, including this presumption, the scales are in even balance, the finding will be for the contestant on the ground that the executor has failed to sustain the burden of proof."

Citing other Massachusetts authorities.

This language, it appears, is the same language used by the trial justice in the case at bar, for he told the jury (bottom of page, R. 52):

"As I have stated, the burden of proof is upon those who seek to sustain the will to show to the jury by a fair preponderance of the evidence, taking into consideration the presumption of sanity, that the testator was of sound and disposing mind and capable of executing a valid deed or contract at the time of the execution of the will."

The Missouri Court of Appeals had before it this question of burden of proof, as is reported in

RAYLE vs. GOLFINOPULOS,
233 S. W. Rep. 1069.

The court in this case in discussing, considering and disposing of the question of burden of proof, as found on pages 1070 and 1071 of this volume, said:

"The petition of the plaintiff in setting out her case alleges the formal execution of the will, so that it might be said that the plaintiff could not now assert that it was not now executed. In the same connection the petition alleges that the instrument so formally executed was not the will of Charles S. Dunford, because he was not of sound and disposing mind at the time. The formal execution of the will and the possession of mental capacity to exercise it are quite distinct and must be proven as separate facts. * * *

"In every will contest the burden is on the proponents, not only to prove the formal execution of the will, but that the administrator was of sound mind at the time. * * *

"And that burden rests with the proponent throughout the case."

The Court of Appeals of the State of Texas considered this question, as found in

CAMPBELL vs. CAMPBELL,
215 S. W. Rep. 134.

The court in deciding the question of burden of proof, as found on page 141 of this volume, said:

> "Before the proponent of a will is entitled to have it admitted to probate he is required to prove that the administrator at the time the will was executed was twenty-one years of age or married, of sound mind, and is dead, with other matters unimportant here. Art. 3271 Vernon's Sayles Civ. Stats.
>
> "It has been declared that until all of the constituent facts required by the statutes are proven the will may not be admitted to probate. * * *
>
> "Such facts the article of the statute declares must be shown. As we construe its meaning such facts must be proven whether there is a contest or whether the pleadings raise the issue or not."

The Supreme Court of *Colorado* had before it the question of the burden of proof and it was decided by the Supreme Court of that State in the case of

ROEBER vs. CORDWAY,
199 Pac. Rep. 481.

Justice Teller in deciding this question in the case, as found on page 482, says:

> "By offering the will for probate the proponent in fact asserts that it was executed by Roeber at a time when he was of testamentary capacity. This proposition has the benefit of the presumption of sanity which the law raises. The presumption being one of fact, it is only a matter of evidence and does not in any sense relieve the proponent of the burden by a preponderance of evidence, the affirmative of the issue tendered. If no evidence to the

> contrary is introduced, a case is made out, but if such evidence be introduced, the question then is whether, upon the whole evidence, including this presumption, the burden of proving the affirmative has been sustained. If the evidence be evenly balanced, the finding will be for the contestant."

This court, it will be noted, cites the Massachusetts case and the Indiana case in support of its ruling.

This question was likewise before the Supreme Court of *Michigan*, and is found reported in

IN RE HOYLE'S WILL,
127 N. W. Rep. 284.

The court in disposing of the question of the burden of proof, as found on page 288 of this volume, said:

> "The question of undue influence was withdrawn from the jury and the whole question was as to the mental competency of the administratrix. There was evidence pro and con upon this last question, and in our opinion it presented a fair question of fact for the jury to consider and the burden of proof was on the proponent."

The Supreme Court of *Vermont* likewise had this question before it, as found reported in

IN RE BARNEY'S WILL,
40 Atlantic Rep. 1027.

This case is especially interesting in that the court reviews many decisions in many jurisdictions and discusses at great length the question of burden of proof, and the court in disposing of the question of burden of proof, as found on page 1029, said:

> "The contestants insisted that they were entitled to have that request complied with and that the court erred in not charging that the burden of

proof was upon the proponent to show that the will was not procured through undue influence. The instructions upon this point of the case were as follows:

'This inquiry which you are to take up has three main divisions:

(1) In the first place, was this instrument, which is presented, executed with the formalities required by the statute?

(2) If it was so executed, did the administrator have at the time he executed it, such capacity as the law requires one to have who undertakes the making of a will?

(3) If the will was so executed and the administrator had such capacity, was there any such undue influence as prevents the will being considered the real will of Ira Barney?'

On the first two of these questions the burden is upon the proponent or the plaintiff. The proponent must show by a fair preponderance of evidence which will be hereafter explained to you, that this will was executed by the formality required by the statute and that the executor had the requisite degree of mental capacity at the time of executing it. If the proponent makes out these two issues, then the will is to stand unless the contestants have shown by a fair preponderance of the evidence that, notwithstanding these facts, the will was really the result of undue influence.''

The court then takes up and considers at great length, citing many authorities on the question of burden of proof, and finally concludes his opinion by holding that the proponents of the will must sustain the burden as to mental capacity. I cite this case especially because of the manner in which the court has taken up and reviewed the authorities on the subject.

These several decisions of the several states quoted from by us are in each instance decisions where the court has had under consideration statutes which required proof of due execution or of mental capacity, before a will can be admitted to probate.

In each instance they have held that the burden was upon the proponent of the will when the mental capacity of the testator and due execution was put in issue by caveat.

The Maryland Courts have held that the burden of proof in a will contest was upon the caveatee—the the proponent of the will—until the decision of Judge Brent in Higgins vs. Carlton, 28 Maryland 115, and this decision of Judge Brent's in the Higgins' case, seems to have been followed by the Maryland Courts.

This decision was followed by the Supreme Court of the District of Columbia until the decision of the Court of Appeals of the District of Columbia in Rich vs. Lemmon, *supra* (decided December 6, 1899), which decision of the Court of Appeals has been recognized as the law in the District of Columbia, until this question in this case was presented to the Court of Appeals in the light of the language of this court as expressed in Leach vs. Burr, *supra.*

CONCLUSION.

Counsel for the appellant in his brief has devoted several pages to a discussion of what the record in the Court below contains.

Counsel for the appellant likewise has devoted the last nine pages of his brief to a discussion of law based upon what Counsel states is contained in the record of this case in the Lower Court.

It is our understanding that this court will answer

the question certified to it by the Court of Appeals of the District of Columbia upon the record as contained in the certificate of the Court of Appeals of the District of Columbia.

That record is the only record before this court for its consideration.

We have, therefore, not undertaken to answer the appellant counsel's statement as to what the record in the Court of Appeals of the District of Columbia contains, nor have we attempted to answer his argument dealing with a state of facts differing from those set forth in the certificate of the Court of Appeals of the District of Columbia, which is the only record before this court.

We respectfully submit that the statement of counsel for appellant as to what the record of this case in the Lower Court shows, is not a complete and accurate statement of that record.

In conclusion, we respectfully submit that the law in the District of Columbia as decided by the Courts of Appeals of the District of Columbia in Rich vs. Lemmon, *supra*, holding that the burden of proof in an issue of mental capacity was upon the caveatee—the proponent of the will—should not after these many years be disturbed by this court.

We likewise most respectfully submit that the great weight of authority is in favor of such a rule of law under a statute similar to the one in force in the District of Columbia, and that such should be the answer to the question certified.

Respectfully submitted,

W. Gwynn Gardiner,
Abner H. Ferguson,
J. Wm. Tomlinson,
Attorneys for Appellee.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1923.

No. 56.

JOHN BROSNAN, ET AL., *Appellants,*

vs.

MARGARET E. BROSNAN, *Appellee.*

SUPPLEMENTAL BRIEF.

STATEMENT OF CASE.

The transcript of record in the Court of Appeals of the District of Columbia in the above entitled cause being now before the Court by agreement of counsel, we invite the Court's attention to the following portions of the record.

The record states (R. 5, 2d paragraph of the widow's petition to caveat) thus:

> "That it has come to her notice that certain paper writing bearing date of the 29th day of July,

1918, has been on, to wit, the 6th day of May, 1919, filed in this court, and has been, to wit, on the 12th day of August, 1919, admitted to probate and record as the last will and testament of said Timothy Brosnan, deceased."

The petition then proceeds to state:

(a) That the said paper writing was not the last will and testament of said deceased.

(b) That the deceased was not at the time of the making and the subscribing or of the acknowledging by him of said paper writing of sound and disposing mind and memory or capable of making a valid will, deed, or contract.

Upon this petition (R. 6) issues were framed by the Court. Among said issues, we find:

(1) Was the paper writing, bearing date, the 29th day of July, 1918, and purporting to be the last will and testament of Timothy Brosnan, executed by the said Timothy Brosnan in due form of law as his last will and testament?

(2) Was Timothy Brosnan, at the time of executing the paper writing, bearing date of the 29th day of July, 1918, and purporting to be his last will and testament, of sound and disposing mind and capable of executing a valid deed or contract?

By further reference to the record (R. 7) the following order of the Court will be found:

"It is by the Court this 6th day of April, 1921, ordered that the caveatees be, and they are hereby made plaintiffs at the trial before the jury and the caveator is made defendant. And to this order the caveator by her counsel objects and excepts.

"JENNINGS BAILEY,
"*Justice.*"

It will be noted that under this order aligning the parties, the caveatees being made plaintiff's, were entitled to open and close the case before the jury.

The party carrying the burden of proof is entitled to the opening and closing of his case before a jury.

It will be noted that this ruling of the Court was acquiesced in by the caveatees and that this ruling and this position was not complained of by the caveatees until after all of the testimony was in and their request for instructions to the jury was submitted to the Court.

By reference to the Bill of Exceptions (R. 13) it will be seen that the caveatees, at the trial, assumed the burden of proof and offered testimony in support of these two issues, that is:

(1) That the will was duly executed according to law, and

(2) That the testator was of "sound and disposing mind and capable of executing a valid deed or contract."

After testimony establishing a *prima facia* case upon these two issues, the will was admitted in evidence (R. 14).

When the trial justice instructed the jury, it will be found (R. 52) that the language of the trial justice was in the same language as that stated by Mr. Chief Justice Knowlton of Massachusetts in

CLIFFORD vs. TAYLOR,
204 Mass. Rep., 358.

The trial justice in the case before the Court (R. 52) told the jury as to the burden of proof thus:

> "As I have stated, the burden of proof is upon those who seek to sustain the will to show to the

jury by a fair preponderence of the evidence taking into consideration the presumption of sanity that the testator was of sound and disposing mind and capable of executing a valid deed or contract at the time of the execution of the will. If you find that they have sustained that burden then your answer to the second question should be yes. If, on the other hand, you should find that the evidence is evenly balanced or that the weight of the evidence is in favor of finding that the testator was of unsound mind, your answer should be no."

IN THE DISTRICT OF COLUMBIA THE PROCEEDING TO ESTABLISH A WILL IS A COMMON LAW ACTION.

The probate of a will is an action at law and not a proceeding in equity. See

ORMSBY vs. WEBB,
134 U. S. 47.

CAMPBELL vs. PORTER,
162 U. S. 478.

It will, therefore, be seen that the caveatee under an order of the court in the case, accepted the position of plaintiff in a common law action before a jury, and undertook, by the testimony offered by the caveatee, to prove the things essential under the statute to be proven before admitting the will to probate. The fact that the will had been admitted to probate by a prior order of the court, was nullified and disregarded by all parties to the proceeding in accordance with the established practice in such cases in this jurisdiction.

It will further be found that the proceeding is the

same whether the caveat is filed before or after the admission of the will to probate, *if the caveat attacks the due execution of the will and the capacity of the testator,* as in the proceeding before the court.

The caveatees seek the aid of the Court in proving the things necessary to be proven before the will can be admitted in evidence.

If in this case the movers—the caveatees—had failed to establish or to make out a *prima facie* case upon these two points, then the will could not have been offered in evidence and that would have ended the litigation, since the court would then have directed the jury to return a verdit that the will was not duly executed according to law, or that the testator was not competent to execute a valid deed or contract, and therefore the paper writing had no legal effect as a will.

It may safely be affirmed as a truism that whoever seeks the aid of a court to establish a right in himself against another is the actor in that proceeding, and he, whom the actor impleads, is defendant. A direct denial by a defendant of the whole or any essential part of a plaintiff's case does not make the defendant an actor.

The allegation by plaintiff of the execution of a valid will, even though it does not expressly allege the competency of the testator to execute it, does so by necessary implication. That facts which are necessarily implied in a pleading are as open to traverse as those expressly alleged, is ancient and elementary in the law of pleading. As said in

GILBERT vs. PARKER,
2 Salk Pg. 629.

"Whatever is necessarily understood, intended, or implied is traversable as much as if it were expressed."

Also see

TYLER'S "STEPHEN ON PLEADING," 203.

which says:

"The party offering the will for probate says in effect, 'This instrument was executed with the requisite formalities by one of full age and of sound mind.'

See also

CROWNINSHIELD vs. CROWNINSHIELD, 2 Gray, 257.

A denial of this implied fact by the opponent of the will in his caveat, so-called, that the alleged testator was of sound mind is but a common traverse; it merely denies that the will was executed in manner and form as the plaintiff has alleged, and in no respect constitutes the defendant the actor. It is a direct denial of what the plaintiff alleges; it sets up no new matter it creates a distinct issue of fact and in formal common law pleading would conclude not with a verification, but to the count—submit the issue raised to trial by jury. It is wholly unlike a claim of undue influence which is by way of confession and avoidance, admits the execution of the will and the testimentary capacity of the testator, but alleges that the execution was induced by improper means. In this defense of undue influence the proponent of the will introduces new affirmative matter, and as to that is obviously the actor.

This distinction is clearly pointed out by our Court of Appeals in

RICH vs. LEMMON,
15th App. D. C. 507-509.

There can be no question but what the great weight of authority supports the theory that the burden of proof in a will contest under the issue of *due execution and mental capacity* is upon the proponents of the will.

In the case before the Court the caveat attacked the will upon the ground that it was *not duly executed* and that the testator had *not the mental capacity* to execute a valid deed or contract.

The caveatees joined issue upon these two issues, obtained a ruling from the Court making them plaintiffs, and proceeded to offer proof in support of their position.

In other words, no different position was contended for and no distinction was sought to be made because the will had been admitted to probate before the caveat was filed, than if the caveat had been filed before the will had been admitted to probate.

In view of the fact that no such distinction has been recognized in the District of Columbia, and that no such distinction was sought to be made in this case, the Court of Appeals of the District of Columbia it appears, desired this Court to advise it only as to who bore the burden of proof in will contests, and made no distinction between a case where the will was admitted to probate before the caveat was filed and one where the caveat was filed before the will was admitted to probate.

There is no such distinction in the practice in the

District of Columbia, and there was no such distinction recognized by the Court of Appeals as indicated by the question certified here by it.

PROCEDURE THE SAME WHETHER THE WILL HAS OR HAS NOT BEEN ADMITTED TO PROBATE BEFORE FILING OF CAVEAT.

By reason of the provisions of the Act of June 8, 1898, which make material changes in the former law relating to the probate of wills (in the District of Columbia and in Maryland from whence came our original probate law), no distinction is made in the procedure to be followed in cases where the will was admitted to probate before the caveat was filed, as distinguished from one where the caveat was filed before the will was admitted.

The Court of Appeals of the District of Columbia has laid down the principle that even where the parties concede due and proper execution of the will and mental capacity, nevertheless, in case of a caveat, one of the issues must be:

(a) Was the will duly executed according to law?

See

SAFE DEPOSIT COMPANY vs. HEIBERGER, 19 App. D. C. 506-524.

It will be noted that this decision was rendered by the same Court with the same personnel and after the decision of Lemmon vs. Rich by the Court of Appeals of the District of Columbia. The opinion of the court in this case, as found on page 520 of this volume, upon this point states:

> "The fact of formal execution was submitted by the proponent of the will as a distinct issue, and should have been acted upon in some way because, as we have seen, it cannot be dispensed with by the admission of the caveator or the consent of all concerned."

In the case at bar, it will be seen that one of the issues for consideration of the jury was due execution. The opinion of the Court in this case at page 521 of this volume contains this language:

> "It is in the public interest that all questions touching the validity of a will offered for probate should, if practicable, be comprehended in one trial and settled by one judgment. The submission of this issue, which the caveator does not controvert, would neither interfere with the proceedings of the actual trial nor deprive the caveator of her right to open and conclude that trial."

In the District of Columbia any party in interest may file a caveat to a will; if it be a will of personalty, within three months after it has been admitted to probate in an ex parte proceeding, and within one year after such proceeding, if it be a will of real estate.

See Sec. 137, Code of Laws of the District of Columbia.

It follows, therefore, that in the case at bar, had the caveator filed her caveat without attacking due execution, and the Court should have framed issues and submitted the issues to a jury, without including the issue of "due execution" and the trial should have resulted in a verdict on all of said issues in favor of said will, any other person in interest could have filed another caveat within the statutory period raising the

question of "due execution," which would have resulted in another trial.

Such a condition as this should not be permitted, since, as the Court said in the Heiberger case:

> "It is in the public interest that all questions touching the validity of a will offered for probate, should, if practicable, be comprehended in one trial and settled by one judgment."

On the same page of this opinion will be found the following language:

> "Although the statute is silent on the point, it would seem that, when not put in issue by the caveat, formal proof of the execution might properly he required before the formation of the issues of the controversy; for if execution cannot be proved the caveat would necessarily be abated."

It necessarily follows, therefore, that if a will has been admitted to probate in an ex parte proceeding, and a caveat is thereafter filed, in which caveat due execution is challenged, an issue is framed so that the jury may determine that question together with the other issues to be submitted to the jury involving the validity of the paper writing, and, therefore, the caveatee—the proponent of the will—must move first and introduce evidence sufficient to make a *prima facie* case—to comply with the statute in every respect,—or the caveator would not be required to move.

Or, as the Court said in this Heiberger case, *supra:*

> "If execution cannot be proved, the caveat would necessarily be abated."

The Courts of the District of Columbia, it appears, when a caveat has been filed after the will has been admitted to probate, where the caveat attacks due execution and mental capacity, treats a formal ex parte probate of the will in the same manner as it would treat a default judgment, where after the default the defendant, by pleadings sufficient to satisfy the Court that he was entitled to a trial, obtained action from the Court setting aside the judgment, in which event the case is tried *de novo.*

The Supreme Court of Indiana in

KILGORE, *et al.* vs. GANNON, *et al.*,
114 N. E. Reporter 446.

decided this question on December 13, 1916, and held that the admission of the will to probate before the caveat was filed was of no avail to the proponent of the will after the filing of the caveat.

I cite this case because of the great number of authorities and text books cited by the learned justice of that court as found in the opinion including a decision of this Court.

The Court of Appeals of Maryland in

CLAGGETT vs. HAWKINS,
11 Maryland, 381.

decided that an ex parte probate of a will was not *res judicata,* but could be attacked at any time by any party in interest.

Under such a procedure and with such inconclusive result, it would be unreasonable to say that such a probate "in common form" as it was styled (in con-

tract to one "in solemn form" granted after the contest) was practically a ministerial act, like recording a deed or bill of sale, and not an "action" or "statute" of any kind.

This Court having decided in

ORMSBY vs. WEBB,
134 U. S. 47.

that a proceeding in the Supreme Court of the District of Columbia for the probate of a will is an action at law, it would seem that when issues were framed and the caveatee—the proponent of the will—proceeded at the trial table to prove *de novo*, the requirement of the statute as to due execution and mental capacity, it follows that the ex parte probate was disregarded and not considered by the court or by the proponents of the will.

It being the settled practice in the jurisdiction of the District of Columbia to entirely disregard and to treat as of no effect an ex parte probate of a will after a caveat has been filed attacking due execution of the will and mental capacity, and these proceedings being followed in the case at bar, it can readily be seen that the Court of Appeals treated the ex parte probate of the will as of no legal value and certified the one question of this Court in accordance with its certificate.

Respectfully submitted,

W. Gwynn Gardiner,
Attorney for Appellee.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1923.

No. 56.

JOHN BROSNAN, ET AL., *Appellants*,

vs.

MARGARET E. BROSNAN, *Appellee*.

BRIEF IN REPLY TO SUPPLEMENTAL BRIEF OF APPELLEE.

At the oral argument of this case counsel for appellee asked permission to file a brief citing cases that he claimed were on the books holding that when a caveat was filed after a will had been admitted to probate and record in solemn form, the burden was, nevertheless, upon the caveatee to prove the sanity of the testator on an issue as to his mental capacity. It was claimed on oral argument that there were many cases so holding which would be furnished to the Court in a supplemental memorandum.

The supplemental brief of appellee does not keep

this promise, and is merely a restatement of oral argument.

It is difficult to follow the supplemental argument for the reason that it links with the issue of due execution the issue of mental capacity and makes the general statement, which we respectfully submit is unsupported by the authorities, that the law applicable to the issue as to due execution applies to both issues. For instance, it is said: "There can be no question but what the great weight of authority supports the theory that the burden of proof in a will contest under the issue of due execution and mental capacity is upon the proponent of the will." (Brief, page 7.)

It is to be noted in this case that the will was duly proven and admitted to probate and record; that the caveat of the appellee prays, among other things, as follows:

> "That the probate of said paper writing as the alleged last will and testament of the said Timothy Brosnan, deceased, *may be revoked.*" (R. p. 5.) (Our italics.)

It is sought to enlighten the Court by referring to the case of Safe Deposit Company vs. Heiberger, 19 Apps., D. C., 506-524. An examination of that case will show that a caveat to the will was filed within five days after the petition for its probate and, therefore, before the will had been duly proved by the witnesses and admitted to record. In making up the issues the caveators did not attack the due execution of the will but merely the sanity of the testator. It was because of the fact that the will had never been proved that the Court of Appeals held that it was proper to frame an issue as to the due execution of the will so that in the

event the caveator was unsuccessful the proof and validity of the will would have been established. In that case the caveator not attacking the due execution of the will the Court pertinently says: "Submission of this issue (due execution) which the caveator does not controvert, would neither interfere with the proceedings of the actual trial nor *deprive the caveator of her right to open and conclude that trial.*"

It is significant, if we were to seek chance expressions of the Court of Appeals as a determination of the question on whom the burden of proof rests as it was sought to be done when the case of Rich vs. Lemmon was called to the attention of this Court, that in the Heiberger case the only contested issue related to the mental capacity of the party; and yet the Court of Appeals in the language quoted stated that the framing of a formal issue as to the execution of the will would not deprive the *caveator* of her right to open and close. In this case, however, the issue as to the due execution of the will was not a formal one, but was one of the grounds of the caveat and was made a real issue in the case by the appellee when she filed her caveat. There is nothing in the Court of Appeals' opinion to indicate that should a will be duly proved and admitted to probate and record, in the absence of an attack on the due execution of the will, that common sense or justice would require that it be again proved on a formal issue made.

Throughout the brief it is sought to refer to the proceedings admitting the will of Timothy Brosnan to probate and record as *ex parte*. This, of course, is not justified by the record and the law which shows that the will was duly admitted in solemn form.

We respectfully contend that the decision of this

Court in Leach vs. Burr settles this question as to the burden of proof on a caveat instituted either before or after the probate of a will. It was only because of the citation of state cases where a difference in the application of the rule of evidence is made in reference to caveats filed before and after the probate of a will that this matter was at all referred to.

It is argued that the caveatee made no objection to the order of alignment of the parties. The answer to that is twofold, namely: 1. That the alignment of the parties by the Court could not change the law as to the burden of proof; and, 2, that the caveatee was necessarily made party plaintiff by the issue attacking the due execution of the will.

It is further said that the caveatee proceeded to prove the will and offer testimony as to the mental capacity of the testator. The record shows that the will was proven by the witnesses and the caveatee rested. True, the witnesses to the will testified that the testator was of sound mind. That does not determine its necessity or competency. It was not sought to adduce all of the evidence of caveatee on this issue. Then the caveator proceeded to give her testimony as to the alleged incapacity of the testator. Note the anamolous position of the order of proof should the contention of the appellee be correct. The caveatee, according to the contention of the appellee, has the burden of proving sanity; yet he is not required to offer all of his testimony in chief as would be expected when such burden exists, but merely makes proof of the due execution of the will. Then the caveator offers all of her testimony as to the alleged incompetency of the testator; then the caveatee offers testimony as to his competency. Under the rules of evidence, after a

defendant's testimony is adduced, further testimony by the plaintiff would be in the nature of rebuttal evidence. It can not be said that rebuttal testimony is testimony offered to make out the plaintiff's case. It would logically follow that if the caveatee had the burden of proof he would be called upon to offer all of his testimony in chief. That was not done and not contemplated even by the judges who have misunderstood the meaning of the decision of this Court in Leach vs. Burr.

As the appellant's brief cited the authorities which hold that the burden of proof in any event is upon the caveator after the will has been probated, and the appellee in her supplemental brief has cited only one case, we do not find any further substance in the supplemental brief to answer.

Respectfully submitted,

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R. H. YEATMAN,
Attorneys for John Brosnan, et al.

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CASES CITED

TEXT BOOKS CITED

STATUTES CITED

IN THE

Supreme Court of the United States

OCTOBER TERM, 1922

No 435

JOHN BROSNAN, JR., ET AL.,
vs
MARGARET E. BROSNAN

BRIEF FOR JOHN BROSNAN, JR., ET AL.

This case comes on for hearing on a certificate from the Court of Appeals of the District of Columbia certifying for answer the question, "upon the issue whether the testator at the time of the execution of the will was of sound and disposing mind and capable of executing a valid deed or contract, is the burden of proof in the District of Columbia, upon the caveator or caveatee?"

In this case Timothy Brosnan, a citizen of the United States and a resident of the District of Columbia, died in the said District, his last domicil, May 2, 1919, leaving a last will and testament dated July 29, 1918, devising and bequeathing both real and personal property, and naming Albert F. Fox as sole executor. The

will was filed May 6, 1919, and May 8, 1919, it was fully proved by the subscribing witnesses thereto. All of the resident heirs-at-law and next-of-kin of the said testator executed and filed written waivers of service of citation and consent to probate and record and issuance of letters testamentary, and by order of August 12, 1919, the court admitted the will to probate and record as a will of real and personal property, and issued letters testamentary to Albert F. Fox, conditioned on his giving a bond as therein required; and August 24, 1919, his bond was approved and filed, and letters testamentary were issued to him, and he thereupon proceeded with the administration of the estate.

November 6, 1919, or about two and one-half months after the will was admitted to probate and record, Margaret E. Brosnan, widow of the testator, filed a caveat to the said will, alleging that (1) it is not the last will and testament of the decedent, (2) that he was not, at the time of the making and subscribing and acknowledging thereof by him, of sound and disposing mind and memory, or capable of making a valid will, deed or contract, (3) that the alleged last will and testament was obtained by the exercise of undue influence on the decedent, and (4) that it was not freely or voluntarily executed by the decedent as his last will and testament, but the execution thereof, the subscription thereto, and the publication thereof, by him were procured by fraud, coercion and duress, exercised on him. Issues on the said caveat were framed by order of January 23, 1920. February 11, 1920, the said Margaret E. Brosnan renounced her rights under the will and elected to take her dower or legal share, reserving her right to contest the validity of the alleged will and to prosecute her caveat thereto. By order of April 6,

1921, the caveatees (John Brosnan, Jr., Mary Bramhall, Irene McCarthy, Nellie Brosnan, Julia Meinberg, and Catherine Vernon) were made plaintiffs on the trial before the jury and the caveator (Margaret E. Brosnan) was made defendant; and to this order the caveator objected and excepted. The jury was empaneled and sworn April 6, 1921, and returned a verdict April 26, 1921, against the will by answering issue (1) in the affirmative, issue (2) in the negative, issue (3) in the negative, and issue (4) in the negative, the issues corresponding to the caveator's objections to the will above mentioned.

While the certificate itself does not disclose whether the caveat was filed before or after the will was admitted to probate and record, yet the record expressly shows that it had been admitted to probate and record, not *ex parte,* but in solemn form, corresponding in purpose and effect to the probate in solemn form of the English ecclesiastical courts. 16 *Ency. Pl. & Pr.* 993. The first objective of the caveat was therefore directed at the order admitting the will to probate and record, upon the ground that the basic elements upon which the order was bottomed had no foundation in fact.

Section 130 of the Code of the District of Columbia provides, among other things, that upon the filing of a petition for the probate of a will a citation shall be issued to all persons who would be entitled to or interested in the estate of the testator in case such will had not been executed, citing those persons to appear at a designated time to show cause why the prayer of the petition should not be granted. In case personal service is not had, then publication is provided for. If upon the return date no caveat is filed proofs of the execution of the will are received.

Section 131 provides for the presentation of the proof of publication and the taking of the testimony of the witnesses to the will.

Section 133 permits any person, although not cited, who may be interested in sustaining or defeating the will to appear and support or oppose the application to admit the same to probate.

Section 134 provides for the admission of the will to probate and record, if, upon hearing proofs submitted the Court is of opinion that the will was duly executed and the testator was competent to execute the same.

Section 136 permits a caveat to be filed by any party in interest either upon or prior to the hearing of the application to admit the will to probate.

Section 137 reads as follows:

> "If, upon the hearing of the application to admit a will to probate, the court shall decree that the same be admitted to probate, any person in interest may file a caveat to said will and pray that the probate thereof may be revoked at any time within three months after such decree, if it be a will of personal property, and as far as it is a will of personal property; and if it be a will of real estate, and as far as it is such a will of real estate, any person interested actually served with process or personally appearing in such proceedings may file such caveat within one year after such decree; any person interested who at said time was returned 'Not to be found' and was proceeded against by publication may file such caveat within two years after such decree; and any person interested who at the time of said decree is within the age of twenty-one years may file such caveat within one year after he becomes of age."

It will thus be seen that under the law in the District of Columbia there is no such thing as probating a will *ex parte*, but that a solemn form of procedure is provided for corresponding to the probate in solemn form of English ecclesiastical courts.

While there is some diversity of opinion elsewhere as to whether or not the burden is upon the proponent of a will to establish the sanity of the testator when it is attacked by a caveat, yet the question was determined in the early stages of the history of our courts and of the courts of Maryland, which held that the burden of proof was on the caveator.

At the June term of the United States Circuit Court of the District of Columbia, held in 1807, in the case of *Dunlop vs. Peter*, 1 Cr. C. C. 403 (Fed. Cas. No. 4168), precisely the same argument was advanced in behalf of the contention that the burden is upon a proponent of a will, as was advanced in the Court of Appeals in this case by Margaret E. Brosnan, the caveator.

As appears in the report the contestants (plaintiffs) urged: "The plea is that the testator was of sound mind and of this they put themselves on the country; the affirmative of the issue is with the defendants." On the other hand, it was argued: "The plaintiffs were the original libellants, and the general rule is that the plaintiff is to open and close unless special circumstances make the other rule necessary. The affirmative of the issue is with us, not the mere form of words, but the substance; we have the burden of proof."

The contestants of the will were made plaintiffs. In passing on this point, which was the only one presented, the opinion reads:

> "The substance of the affirmative of the issue is with the plaintiffs, the original libellants. They

> are the party who wish to alter the existing state of things. The defendants can offer no evidence until the sanity of the testator is impeached. The defendants have nothing to do. The plaintiff is the mover, the actor, and on him the burden of proof lies. It is his business therefore to open and close the argument."

In the case of *Higgins vs. Carlton*, 28 Md. 115, decided in 1867, the same question was presented by a prayer denied by the court below seeking to place upon the caveatees the burden of proving that the testator was at the time of the execution of the alleged will of sound and disposing mind and capable of making a valid deed or contract (p. 122). The Court granted a prayer in the following language:

> "That the presumption of law is in favor of the sanity of the testator, and of his capacity to make a will, and the burden of proof is upon the caveators to establish a want of testamentary capacity, in order to justify the jury in setting aside the will on that ground." (P. 123.)

The same argument was made in that case as was presented in the case at bar, namely, "That where the capacity of the testator is impeached the Onus Probandi is on the party propounding the will. Testamentary capacity is defined by statute. To establish a will, therefore, there must be proof both of capacity and of the fact of execution." (P. 129.)

In holding that the burden of proof is on the caveator the Court says:

> "The question as to the onus probandi, where the issue is testamentary capacity, has been a great deal discussed by both Judges and text writers,

> * * * The numerous decisions upon the subject, in this country, are by no means uniform, and many of them are in direct conflict, so that any attempt to reconcile them would be hopeless. They all, however, agree upon the general proposition, that sanity is presumed by law. But, in some states, it is held that this general presumption does not apply to last wills and testaments * * * and that therefore a party propounding a will must not only prove execution, but must also offer positive proof of capacity. * * * A different rule, however, is recognized in most of the American courts, and it is sustained by reason and the weight of authority. * * * The burden of proof lies upon him who asserts unsoundness of mind."
>
> "If the presumption of law is in favor of sanity, we can discover no satisfactory reason why it should not be applied to wills, as well as to any other instrument or writing. The argument drawn from the fact, that the Statute requires a testator to be of 'sound and disposing mind,' if a good one, would apply with equal force to the other requirements of the Statute. The testator, in terms as affirmative as those in reference to capacity, is required to be of a certain age fixed by the Statute. Yet no court has ever required a party, propounding a will, to prove the age of the testator, until the question was raised upon proof by the contestants." (Pp. 141, 142.)

The Court reviews the earlier cases placing the burden of proof upon the person who asserts the unsoundness of mind, and on this point says:

> "These authorities rest upon sound reasoning. They, also, harmonize with the ancient rule of presumption in favor of sanity, and thereby escape the fallacy of requiring a party to give positive proof of the existence of a fact, which the law presumes, in the absence of all proof." (P. 143.)

In the later case of *Tyson vs. Tyson's Executors,* 37 Md. 567, 584 (1872), the Court says:

> "We are of opinion, therefore, that the burden of proof both in regard to want of testamentary capacity and to the exercise of undue influence, was upon the caveators."

In the case last cited the caveators were the plaintiffs and the caveatees the defendants, but the issue framed had regard solely to the mental capacity of the testator and the existence of undue influence, the factum of the will not having been put in issue.

This Court in the case of *Leach vs. Burr,* 188 U. S. 510, which was an appeal from the Court of Appeals of the District of Columbia, had the same question before it.

> "From this direct testimony but one conclusion could be drawn, and that in favor of the mental soundness of the testator at the time he made the will. * * * Upon questions of this kind submitted to a jury, the burden of proof, *in this District at least,* is on the caveators. (*Dunlop vs. Peter,* 1 Cranch C. C. 403; Fed. Cas. No. 4168; see also *Higgins vs. Carlton,* 23 Md. 143; 92 Am. Dec. 666; *Tyson vs. Tyson's Ex'rs.* 37 Md. 567.) The caveators in the present case failed to sustain this burden and we are of the opinion that the trial court did not err in directing a verdict against them." (P. 516.) (Our italics.)

The only criticism that we have heard of the application of the plain language of this Court on the subject settling the rule once and for all for the District of Columbia was the statement by counsel for the caveator that the case only presented the question

whether or not "there was sufficient testimony to raise an inference that undue influence had been practiced upon the administrator by one Stevenson," and the further statement "that from the first in this Court [Supreme Court of the United States] the only question presented to the Court and the only question decided by the Court was 'whether there was sufficient evidence of an undue influence to submit that question to the jury.' " The report of the case dealing with the question presented to this Court reads:

> "But the substantial question is whether the Court erred in taking the case from the jury and directing a verdict sustaining the will. The questions submitted for consideration were whether the testator was at the time of executing the will 'of sound mind, capable of execuing a valid deed or contract;' 'whether the will was procured by the threats, menaces and duress exercised over him (the testator) by Samuel H. Lucas or any other person or persons,' and whether it was 'procured by the fraud of Samuel H. Lucas or any other person or persons.' " (P. 513.)

In referring to the evidence the Court says:

> "* * * The caveators called four witnesses as to his mental condition. * * * So far from their testimony tending to show mental weakness, it was abundant and emphatic that he was a man of positive convictions, clear headed, though perhaps eccentric in some views, but at all times fully capable of making his own contracts and attending to his own affairs. * * * Seven physicians were called, who * * * concurred that it was contrary to their experience and reading that a man seventy-three years of age dying of acute pneumonia, should have testamentary capacity between three and four hours before death." (P. 513.)

Since the ruling of this Court deciding the exact question involved herein, and citing approvingly the Maryland cases unqualifiedly placing the burden of proof upon the caveator, this question has been supposed to be settled in the District of Columbia. Indeed, it has been so considered by the Judges of the Supreme Court of the District of Columbia until recently. The rule was clearly stated by former Justice Barnard in *Turner vs. American Security & Trust Co.* (Vol. 149, at page 60, of the Records and Briefs of the Court of Appeals of the District of Columbia). Instructing the jury, Justice Barnard stated:

> "That the presumption of law is in favor of the sanity of the testator and of his capacity to make a will; and the burden of proof is upon the caveator to establish by a fair preponderance of the testimony a want of testamentary capacity in order to justify the jury in setting aside the will on on that ground."

And, further, the Court, in charging the jury, said:

> "The caveator has the burden of proof. He must, of course, satisfy your minds by a perponderance of the evidence that the testator was of unsound mind at the time this will was executed, and he must satisfy you on the other issue, if you find that issue in his favor, that the will was procured by undue influence.
>
> "In arriving at that point as to whether he does establish that burden of proof, that is, whether he satisfies your minds by a preponderance of evidence, of course, you are to consider his interests as well as the interests of every other witness who may have any interest in the controversy, in determining the credibility of his testimony."

In *Carico v. Kirby,* 3 Cr. C. C. 594 (Fed. Cas. No. 2442), May, 1829, the court, on the authority of *Dunlop v. Peter, supra,* ruled that on an issue, from the Orphans Court, *devisavit vel non,* the party contesting the will has the right to open and close the argument to the jury.

In *Lippard v. Humphrey,* 28 App. D. C. 355, speaking to the local statutes relative to the making of wills and the procedure for their probate, the Court used the following language (360):

> "No distinction is made between them in the former or existing statutes regulating the making of wills, and procedure for their probate. In all cases the subscribing witnesses, if living and within the jurisdiction, must be called to prove the fact of execution; and if it appears, from the evidence, that the will was formally executed and the testator competent, it must be admitted to probate."

In *Will of Shelley,* 34 Washington Law Reporter 801, the Supreme Court of the District of Columbia, in a will contest in which the issue of mental capacity was involved, held that the caveatees are entitled to the benefit of the presumption that the testator was of sound mind when the will was executed, and the burden of proof to show want of the requisite mental capacity is on the caveators.

In the case of *Estate of Hayes,* 55 Colorado 340, 135 Pac. 449, 33 Am. & Eng. Ann. Cas. (1914C) 531, decided March 3, 1913, the testatrix executed her last will and testament, and died a few months later. The will was admitted to probate and record by the proper court, and within due time thereafter the children of her half-brother (who were probably her sole heirs at

law) filed a caveat alleging that she was of unsound mind at the time of making the will, and also alleging undue influence, fraud and duress brought to bear upon her by some of the beneficiaries, and further alleging that it was not her will. The verdict of the jury and the judgment of the court sustained the will. Speaking to the subject of the burden of proof, the Court said as follows (pages 345-346, 348-349):

> It is claimed that the court erred in refusing to instruct that the burden of proof is primarily upon the proponents of the will to show its execution in accordance with the requirements of the law; that the instrument is the free and voluntary act of the testatrix, and that the instrument offered by proponents is the same and identical instrument which the testatrix executed as her last will. *Snodgrass v. Smith*, 42 Colo. 60, 94 Pac. 312, 15 Ann. Cas. 548, is cited as supporting this position. The facts are not the same. There the contest arose at the time of the attempt to probate the will. In the case at bar the will was duly admitted to probate upon the proof submitted by the proponents after due notice, as required by general sections 7082 and 7083, Revised Statutes, 1908. It appears that the plaintiffs were nonresidents; that service upon them was by publication only and that within the year they instituted this action to contest the validity of the will, as provided for by general section 7096, Revised Statutes, 1908. This question pertaining to the burden of proof upon a contest after the will had been admitted to probate, has been a troublesome one in many jurisdictions. It is not possible to reconcile the decisions. As the question is one of first impression in this court we shall adopt the rule which, in our opinion, is consistent with the language of our will act of 1903. It appears that under the English practice there were two modes

of proving a will of personal property; the common form, in which the will was propounded by the executor and proved ex parte, and the solemn form, in which the next kin of the testator were cited to witness the proceeding and in which the proof was taken in due form of law.

These different methods have generally been followed in the United States and applied to both real and personal property, but with considerable diversity in their technical features. In some states the proceeding in the probate court upon original application is entirely ex parte; in others, a notice and an opportunity for a contest is given, the right of appeal, etc. This last method corresponds in purpose and effect to the probate in solemn form of the English ecclesiastical courts. 16 Enc. Pl. & Pr. 993.

* * * * * *

Aside from this, in a contest of a will which has theretofore been duly admitted to probate, where the statute does not provide otherwise, or is like our section 7096, silent upon the subject, the same rule governs with regard to issues framed by the pleadings as applies in actions generally; one of which is that the burden of proof is upon him who makes the allegation. In the case at bar it was conclusively shown by the plaintiffs' pleadings, as well as by the records of the county court, that the will had been admitted to probate in solemn form; that the court had jurisdiction and all the facts appear to show prima facie a valid will. The order of the court admitting the will to probate must have some force, for which reason the burden of proof was upon the contestants to establish the material facts alleged and the court was right in refusing to give the instructions offered. This position is in harmony with the provisions of our statutes and is supported by the great weight of authority in states having similar provisions.—*Hunt v. Phillips*, 34 Was. 362, 75 Pac. 489; *Hutson v. Hartley*, 72 Ohio St. 262, 74 N. E. 197; *Runyan*

v. Price, 15 Ohio St. 1, 86 Am. Dec. 459; *Franklin v. Boone,* 39 Tex. Civ. App. 597, 88 S. W. 262; In *re McKenna's Estate,* 143 Cal. 580, 77 Pac. 461; In *re Kilborn's Estate,* 162 Cal. 4, 120 Pac. 762; *Steinkuehler v. Wempner,* 169 Ind. 154, 81 N. E. 482, 15 L. R. A (N. S.) 673; *Teegarden v. Lewis,* 145 Ind. 98, 40 N. E. 1047, 44 N. E. 9; *Blough v. Parry,* 144 Ind. 463, 40 N. E. 70, 43 N. E. 560; *Turner v. Cook,* 36 Ind. 129; *Moore v. Allen,* 5 Ind. 521.

In a note to the *Hayes* case, as reported in 33 *Am. & Eng. Ann. Cas.* (1914 C.) 535, the annotator states as follows:

> The reported case holds that in a contest of a will which has theretofore been duly admitted to probate the burden of proof is on the contestant to establish his grounds of contest. The great weight of authority supports this ruling. In addition to the cases cited in the opinion of the court, see the following cases: *Head v. Nixon,* 22 Idaho 765, 128 Pac. 557; *Pence v. Myers* (Ind.), 101 N. E. 716; *Sanger v. Bacon* (Ind.), 101 N. E. 1001; *Scott v. Thrall,* 77 Kan. 688, 95 Pac. 563, 127 Am. St. Rep. 449, 17 L. R. A. (N. S.) 184; In re *Murphy's Estate,* 43 Mont. 353, Ann. Cas. 1912C 380, 116 Pac. 1004; In re *Durand,* 194 N. Y. 477, 87 N. E. 677, affirming 127 App. Div. 945, 111 N. Y. S. 1118; *Scott v. Barker,* 129 App. Div. 241, 113 N. Y. S. 695; *Shayne v. Shayne,* 54 Misc. 474, 106 N. Y. S. 34; *Mordecai v. Canty,* 86 S. C. 470, 68 S. E. 1049. In upholding this rule the court in the case of In re *Murphy's Estate,* supra, said: "The trial is initiated when the formal preliminary proof of the execution of the will is before the court; that is, formal proof that the testator was of sound and disposing mind, and that the formalities required by the statute were observed. Proof of these facts having been made, the order admitting

the will to probate follows as a matter of course, but for the contest. Thereupon the general burden is upon the contestant throughout to establish, by a preponderance of the evidence, the facts upon which he relies to have it set aside. Of course, when he has made out a prima facie case, the burden is cast upon the proponent to furnish rebuttal proof, but he is not required to do more than this; and, if in the end the contestant has not sustained the burden, his contest must fail."

In Missouri the rule appears to be that where the contestant's petition expressly charges that the will was not executed by the testator or the subscribing witnesses the burden is on the proponents of the will to prove its execution. *Bensberg v. Washington University,* 251 Mo. 641, 158 S. W. 330, *Berst v. Nixon,* 157 Mo. App. 342, 138, S. W. 74. When, however, the proponents have made a prima facie case, it devolves on the contestant to overthrow it by evidence. *Teckenbrock v. McLaughlan,* 209 Mo. 533, 108 S. W. 46.

In *Austin v. Austin,* 260 Ill. 299, 103 N. E. 268, 34 *Am. & Eng. Ann. Case* (1914D) 336, decided October 28, 1913, a will contest determined against the will in the court below and reversed on appeal, the court said (314):

> * * * It is incumbent on the contestants to prove by a preponderance or greater weight of the evidence that Mrs. Corkey did not have sufficient mental capacity to make a valid will at the time she executed the writing offered in evidence as her will. * * *

In the case of *Kerhoff v. Monkheimer,* 175 N. W. 762 (Iowa), the court said:

> The presumption is that the testator was capable of making a will, and the burden is on the con-

testant to show by affirmative evidence that he did not have such capacity.

In *Underhill on Wills,* the author expresses his views on the subject of the burden of proof of testamentary capacity, in the following language (Sections 85, 86):

> "All the statutes which regulate the execution of wills require that the testator at the date of execution shall have a sound and disposing mind or memory. * * * In the opinion of the writer, the difficulty with which the subject has been and is surrounded is largely due to the fact that it is treated by the text-writers from an academic or theoretic standpoint rather than from a practical one. * * *
>
> "It is a presumption of law that all men are of sound mind and able to attend to their ordinary affairs. Sanity of mind is the normal condition of most human beings, and he who would prove the contrary in any particular case must produce evidence to sustain his allegations. So applying this principle to the probate of wills, it is the general rule, which is sustained by the majority of cases, that all persons of the statutory age are presumed to have testamentary capacity; and it follows from this, that the party who contests the probate of a will upon the ground of a lack of such capacity has the burden of proof to show incapacity by evidence upon that point, except in the single case where the testator is shown to have suffered from fixed insanity, not mere delirium, prior to the execution of the will.
>
> "It is often said that the burden of proof to show due execution of the will and capacity is on the proponent. By this no more is meant than that he must make out a prima facie case by the subscribing witnesses. Proof by the subscribing witnesses that the testator requested them to attend the execution of his will; signed it in their

> presence; stated it to be his will; and performed the other necessary acts of execution and that he did this in a rational and intelligent manner, may in itself justify a presumption that he possessed testamentary capacity at the time."

The law in this jurisdiction was settled by this Court many years ago, and was the rule invariably followed in will contests until recent holdings of the Supreme Court of the District of Columbia in direct opposition to the views expressed by this Court, apparently because the subject was approached from "an academic or theoretic standpoint" rather than a "practical one."

If we consider the question of burden of proof *after* a will has been admitted in solemn form, complying with the many stringent provisions of the Code of Law for the District of Columbia heretofore cited, giving the person in interest an opportunity to set aside the will after its probate and record, we find the cases in the States almost unanimous in placing the burden upon the caveator.

> "The Courts are almost unanimously agreed that one who, after the probate of a will, brings an action or proceedings to contest its validity and to have it set aside on the ground of testamentary incapacity, has the burden of proving such incapacity." 40 *Cyc.* p. 1022, and cases cited.

While a large number of authorities may be cited holding to the views expressed here and in Maryland, we feel that no better summary can be given than that to be found in 28 *R. C. L.* 398:

> "It is quite generally agreed that the burden of proving the due execution and attestation of a will

> is upon the proponents, for whenever the death of any person is shown, until rebutted, the presumption is that he died intestate, and that his estate descends in pursuance of the laws of inheritance. Even after a will has been probated it has been held that an action questioning its validity casts upon those who claim under it the burden of proving it. * * * The weight of authority, however, is to the effect that in a contest of a will which has theretofore been duly admitted to probate the burden of proof is on the contestant to establish his grounds of contest. The probate is held to be *prima facie* evidence of the due attestation, execution and validity of the will, and the burden is upon the contestants to overthrow the will."

On undue influence, the caveators have the burden of proof. *Will of Shelley,* 34 Washington Law Reporter 801 (Supreme Court of the District of Columbia). On residence of testator, and on question whether he left any personality in the District of Columbia, the burden of proof is on the caveatee. *Overby v. Gordon,* 13 App. D. C. 392. In a will contest, there is a legal presumption that the caveatee has not used undue influence, and that presumption remains until some testimony is offered tending to overthrow it. *Freitag v. Freitag,* 47 App. D. C. 1.

In *Overby v. Gordon,* 13 App. D. C. 392 (affirmed in 177 U. S. 214), decided November 2, 1898, the court said (406):

> With reference to the first assignment of error founded upon the ruling of the trial court in the arrangement of the parties, as plaintiff and defendants, respectively, it appears that there are cases in Maryland and elsewhere, in which the ruling of a trial court in the arrangement or alignment of parties as plaintiffs and defendants, in

respect of issues sent from a probate court, has been made the subject of exception, and has been assigned as error and reviewed in an appellate tribunal; but that matter has been settled for us by repeated decisions of the Supreme Court of the United States, which have held that the ruling of a trial court on the question as to who should open and close a case is merely a matter of practice not proper to be made the subject of exception or to be reviewed upon writ of error. *Lancaster v. Collins,* 115 U. S. 222; *Hall v. Weare,* 92 U. S. 728 *Day v. Woodworth,* 13 How. 363, 370.

In *Rich v. Lemmon,* 15 App. D. C. 507, the court held that the order of alignment was not appealable, in the words following (509-510):

"The question, however, of the position of the parties in the trial of such issues would seem to be largely a matter of discretion of the trial court, and from the determination of such question no appeal will lie to an appellate court. It is true, in some jurisdictions, as in the courts of Maryland, it would seem to be settled as matter of practice that the caveator, being the assailant of the alleged will, is generally assigned the position of plaintiff upon the record, with right to open and close, and that the determination of the question is a subject-matter of review by the appellate court of the State. *Townsend v. Townsend,* 7 Gill 10; *Edelen v. Edelen,* 6 Md. 293. But in the courts of the United States the rule is different, and there is no appeal from the decision of such question; the matter resting in the discretion of the trial court, there is no review of such decision by an appellate court; and we think this is the proper practice. *Day v. Woodworth,* 13 How. 363 *Hall v. Weare,* 92 U. S. 728; *Lancaster v. Collins,* 115 U. S. 222; *Overy v. Gordon,* 13 App. D. C. 406.

"It follows that the appeal must be dismissed."

We respectfully submit that the well-settled law in this jurisdiction is that the burden of proof of mental incapacity is upon the caveator, whether the will be attacked before or after it has been admitted to probate and record in accordance with the Code of Laws, and that such should be the answer to the question certified.

Respectfully submitted,

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